K. Ogle
WA 2302
12-27-99
5f.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

DEC 27 1999

FILE COPY

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. John P. Donahue, Senior Vice President,
General Counsel & Secretary
Rhodia Inc.
CN 7500
Cranbury, NJ 08512-7500

Mr. John M. Iatesta, Assistant Secretary
Rhone Poulenc Ag Company Inc.
(Formerly Rhone-Poulenc, Inc.)
CN 7500
Cranbury NJ 08512-7500

Mr. Richard Padden, Member
Container Properties, L.L.C.
1216 140th Court East
Sumner, WA 98390

RECEIVED
DEC 28 1999
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& CHEM. MGMT

Re: Initial Decision of Dispute of Demand for Stipulated Penalties
Administrative Order on Consent for Corrective Action ("Order")
Docket No. 1091-11-20-3008(h)
Rhone-Poulenc, Inc., Marginal Way Facility
WAD 00928 2302

Dear Sirs:

On November 19, 1999, Mr. Donald J. Verfurth notified the United States Environmental Protection Agency (EPA) of Container Properties L.L.C.'s objections to EPA's November 4, 1999 demand for stipulated penalties. In his letter, Mr. Verfurth requests that EPA reconsider its demand and either eliminate or significantly reduce the penalties demanded. For the reasons set forth below, EPA declines to eliminate or reduce the penalties demanded. Pursuant to Paragraph 16.4 of the above referenced Order, this letter constitutes EPA's initial decision of this dispute.

As you know, Rhone-Poulenc, Rhodia and Container Properties, L.L.C. are each parties responsible for carrying out the terms of the Order. By signing the Order, Respondents agreed to perform certain obligations. One obligation assumed by the Respondents is the payment of

stipulated penalties in the event that the Respondents failed to comply with any term or condition set forth in the Order. The Order allows for relief from stipulated penalties in only three situations. Specifically, in paragraph 15.1, the Order states that:

> Unless there has been a written modification by the U.S. EPA of a compliance date, a written modification by U.S. EPA of an approved Workplan condition, or excusable delay as defined under the "Force Majeure and Excusable Delay" provision, if Respondent[s] [fail] to comply[1] with any term or condition set forth in the Consent Order and its Attachments, or any Workplans approved under this Consent Order in the time or manner specified therein, Respondent shall pay stipulated penalties set forth below upon written demand of U.S. EPA.

None of these situations exist here. In fact, under the terms of the agreed-upon Order, by failing to submit a Groundwater Monitoring Plan ("GWMP") that met all requirements set forth in the Scope of Work for Additional Work ("SOW") and the Order, Respondents failed to comply with the Order and have, thus, subjected themselves to imposition of stipulated penalties. The only way relief from the stipulated penalties imposed could be granted in this situation is if Respondents demonstrate that the facts EPA asserted in support of its imposition of such penalties are erroneous. Mr. Verfurth's November 19, 1999 letter fails to establish that any of the facts that form the basis for imposition of penalties are erroneous.

Respondents Failed to Complete and Submit the GWMP in Acceptable Quality to U.S. EPA as Required by the Order

The penalties imposed by EPA's demand letter were calculated pursuant to Paragraph 15.1 (B). That paragraph sets forth the penalty amounts to be imposed in the event that Respondents fail 'to complete and submit any Workplans. . . in acceptable quality to U.S. EPA." On January 13, 1999, EPA sent Respondents a Determination of Need for Additional Work ("Determination") (enclosed). EPA included a Scope of Work that delineated the minimally acceptable contents of the GWMP to be submitted by Respondents. EPA's Determination further stated that the GWMP "must address all items identified in the enclosed Scope of Work".

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[1]The terms "comply", "to comply", "to be in compliance with", and "compliance" are set forth in definition number 7. of the Order. Specifically the Order states that these terms "may be used interchangeably and shall mean completion of an activity or requirement in the manner and time specified in this Consent Order, its attachments or written U.S. EPA directives. The Respondent[s] must meet both the quality and timeliness components of a particular requirement to be considered to be in compliance with the terms and conditions of this Consent Order." In this case, the Respondents failed to meet the quality component of the requirement to submit a GWMP in accordance with the January 13, 1999 Determination and SOW, and the general requirements of the Order.

In addition, Respondents agreed to accomplish all activities required by the Order "in a manner consistent with RCRA, and applicable U.S. EPA regulations, guidance documents, and policies". Order, Paragraph 3.1(7), see also Order, Paragraph 21.1.

As set forth in EPA's June 16, 1999 Disapproval of the GWMP (enclosed), Respondents failed to address all items identified in the SOW and generally required by the Order. This failure forms the basis for the imposition of stipulated penalties in accordance with the Order.

Assessment of stipulated penalties in response to a deficient initial submission is certainly appropriate under the terms of the Order. The imposition of stipulated penalties in this case is not based on events prior to the submission of the GWMP involving entities other than Container Properties at all, but is solely because the GWMP submitted by Respondents in response to the January 13, 1999 Determination did not meet the requirements of the SOW and the Order.

Moreover, not only did the March 22, 1999 GWMP not address clearly stated elements of the SOW, but also Respondents failed to correct all of the deficiencies that EPA noted in its comments not just one time - when Respondents submitted the July 19, 1999 GWMP - but twice - when a third attempt was submitted on August 20, 1999. As Respondents note, EPA did not prepare written comments in response to the July 19, 1999 GWMP, but EPA is not required to prepare such comments prior to imposing stipulated penalties. Significantly, the comments EPA sent to Respondents June 16, 1999, and reiterated orally to Respondents were still not fully addressed by Respondents in their August 20, 1999 submission. At that point, EPA was left with the options of yet again disapproving the submission or approving it with modifications. EPA chose the latter option in the interest of obtaining some progress at this facility, though it could have disapproved the submission yet again, resulting in the accrual of even greater stipulated penalties.

Mr. Verfurth's letter focuses on only a few of the deficiencies that EPA noted in the GWMP, but in fact there were five pages of comments (23 comments total) only some of which were corrected in the second and third submission of the GWMP. The three deficiencies on which Respondents focuses were the very elements that were never, in fact, corrected by Respondents. EPA reaffirms that the stipulated penalties it has imposed are appropriate and must be paid by Respondents in accordance with the terms of the Order.

The Basis for Imposition of Penalties is Respondents' Failure to Comply with Basic Requirements Set Forth in the January 13, 1999 Determination and SOW

Respondents imply that they could not have submitted a document that complied with requirements under the Order because they did not receive more detailed and specific information until June 16, 1999. On the contrary, the elements itemized as lacking from the March 22, 1999 GWMP in EPA's comments were in fact either specifically delineated in the Determination and SOW provided January 13, 1999, or were obligations set forth in the Order in

Paragraphs 3.1(7) and 21.1.

The SOW set forth the minimal requirements and the July 19, 1999 submission of the GWMP fell far short of those clear requirements. EPA believes the documents speak for themselves. For purposes of elucidation, however, one example of a requirement not met by the March 22, 1999 GWMP that was clearly set forth in the Determination and the SOW was the requirement that at least quarterly monitoring "must continue until decisions are made on appropriate Corrective Measures". This requirement was stated in the Determination. The Determination went on to state that ongoing monitoring may be required throughout the implementation of the Corrective Measure. This is but one basic requirement of the groundwater monitoring that was not contained in the GWMP submitted.

No attempt was made by Respondents to take issue with any requirement. No effort was made to contact EPA and clarify any requirement - an approach no one at EPA has ever discouraged and in fact one that EPA has consistently encouraged at this stage in the process, i.e., the stage during which Respondents are reviewing a Scope of Work or comments provided by EPA. The Order even provides procedures that Respondents may invoke to engage EPA in discussion where requirements are unclear. Those procedures were not invoked in this situation and EPA had no reason to believe any element set forth in the Determination and accompanying SOW was unclear. To the extent that Respondents held such a belief, the appropriate step to take would have been to invoke the procedures contained in the Order, or at least to contact EPA and ask questions.

Mr. Verfurth's statement that the only comments that Respondents received on their July 19, 1999 GWMP were oral is irrelevant to this dispute. It may be significant to note, however, that the oral comments were provided as a courtesy, in response to Respondents' request, and that Respondents in fact benefitted from receiving them. By submitting another version of the GWMP in response to the oral comments, additional penalties that would have accrued otherwise did not accrue. Had that third version of the GWMP submitted on August 20, 1999, not been submitted by Respondents, EPA would almost certainly have been left with no choice but to disapprove yet again the GWMP, rather than approving the submission with modifications. Certainly EPA's effort to provide early notice to Respondents of continued deficiencies so that they had additional opportunity to correct the deficiencies early is no basis for mitigating penalties imposed.

Mr. Verfurth appears to assert that penalties should be mitigated simply because the March 22, 1999 GWMP was Container Properties' first submittal to EPA under the Order. If EPA accepted Container Properties' assertion, then stipulated penalties would never be imposed for an initial submission in response to a requirement of the Order. Obviously such an approach is not consistent with the Order. Specifically, there would be no need for the language in

Paragraph 15.1 which states that EPA "may, in its discretion, waive imposition of stipulated penalties. . . in the event of timely cure of defects in initial submissions" if Container Properties' interpretation of the Order was appropriate.

Respondents assert, without providing any factual support for the assertion, that the penalties imposed are unreasonable in light of the good faith efforts of Respondents. EPA does not agree that Respondents have demonstrated good faith in this situation. To the contrary, one troublesome aspect of this situation is that the cover letters to the July 19, 1999 and August 20, 1999 submissions asserted that all corrections required had been made, when in fact, upon reviewing the GWMP itself, EPA found that all corrections had not been made. Such misstatements cannot be construed as good faith effort in any sense.

Respondents further claim that clerical mistakes should not be the basis for penalties in the amount imposed here. As we have seen from this process, clerical mistakes to the extent that they may have contributed to the failure of Respondents to comply, certainly can and should form the basis for penalties given the delay they can cause and repeatedly have caused to the process agreed to by all parties under the Order. Respondents have a responsibility under the Order to assure the quality of their submissions; the logical result of failure to do so is the imposition of stipulated penalties.

EPA's Penalty Calculations are Accurate

Respondents claim that EPA's calculations of the penalties imposed are not accurate. EPA disagrees. It is undisputed that Paragraph 15.1(B) provide (in relevant part) that penalties:

> [f]or failure to complete and submit and Workplans . . . in acceptable quality to U.S. EPA or at the time required pursuant to this Consent Order: $500 per day for the first one to seven (1-7) days of delay, $1,500 per day for eight to twenty-one (8-21) days of delay, and $3,000 per day for each day of delay thereafter;

As stated in the June 16, 1999 letter in which EPA disapproved the initial submission of the GWMP, for the purposes of imposing stipulated penalties "the first date of noncompliance will be the date of this letter." Thus, the first date penalties are assessed is June 16, 1999 and, in accordance with paragraph 15.1(B), penalties were calculated as follows:

June 16, 1999 to June 22, 1999 (days 1-7) ($500 x 7):		$ 3,500.00
June 23, 1999 to July 6, 1999 (days 8 - 21) ($1,500 x 14):		$ 21,000.00
July 7, 1999 to August 20, 1999 (45 days x $3,000):		$135,000.00
	Total:	$159,500.00

In response to Respondents claims regarding the period of time for which penalties are

imposed penalties accrue, Paragraph 15.2 of the Order states that:

> [a]ll penalties shall begin to accrue on the day after the completed performance is due or the day non-compliance occurs, and shall continue to accrue through the final day of correction of the non-compliance.

Thus, calculation of stipulated penalties is not tied to written notice of deficiencies, but rather the day non-compliance occurs. By implying otherwise in its June 16, 1999 letter, EPA simply erred. In this case, the day non-compliance occurred was the date of the initial submission of the GWMP, March 22, 1999, and the final day of correction of the non-compliance occurred when EPA approved the GWMP with modifications, September 29, 1999. Thus, if EPA made any errors in calculating the stipulated penalties imposed in accordance with the terms of the Order agreed to by the parties, those errors are in the favor of Respondents.

The Deficiencies of the GWMP Warranted a Substantial Penalty

Respondents appear to believe that EPA's imposition of penalties is based on just two areas of the GWMP: the Appendix IX issue, and the Investigation Derived Waste ("IDW") issue. It is unclear to EPA how Respondents came to this belief given the extensive (five pages of 23 comments) submitted to Respondents in EPA's initial disapproval letter, followed by subsequent oral comments provided on the July 19, 1999 GWMP. In fact, even the September 29, 1999 Approval with Modifications still contained five enumerated elements that had yet to be corrected by Respondents in the GWMP despite the provision of the January 13, 1999 Determination and SOW, the June 16, 1999 Disapproval, and the oral comments. These two areas are obviously not the sole basis for the imposition of penalties in this matter.

In response to the issues Respondents raise, however, it is certainly the case that the January 13, 1999 SOW called for "a minimum of three samples . . . from the initial round of sampling which shall be analyzed for all constituents specified in Appendix IX of 40 C.F.R. Part 264." Since that is the exact language of the SOW, it is hard for EPA to understand, even given Respondents' explanation, why the GWMP failed to meet this requirement. EPA reiterated this requirement in comment number 13 of its June 16, 1999 Disapproval. EPA is puzzled by Respondents' admission that it's contractor understood that one of the things EPA was requesting by this language was that three wells should be tested for all constituents specified in Appendix IX of 40 C.F.R. Part 264. The failure to actually address this in the GWMP is certainly one basis for imposing stipulated penalties. The fact that the Respondents did not perform such basic quality assurance (in this case, a simple comparison of the list in the GWMP with the list in Appendix IX of 40 C.F.R. Part 264) just supports EPA's perspective that insufficient effort and attention was paid to ensure compliance with the Order in this case. It is Respondents' responsibility to comply with the Order and the fact that its contractor or laboratory did not meet the requirement is no excuse. Where Respondents failed to make the simple effort to correct a

deficiency not just once (the March 22, 1999 GWMP), or twice (the July 19, 1999 GWMP), but a third time (August 20, 1999 GWMP), certainly no element of good faith is demonstrated.

Similarly, with regard to the IDW issue the Order requires compliance with RCRA, and applicable EPA regulations, guidance documents, and policies. Paragraph 3.1(7) and Paragraph 21.1. EPA and State of Washington regulations require that hazardous waste be handled in a certain manner. Given the likelihood that the purge water, whether or not from wells in the toluene plume area, could be contaminated with hazardous waste, Respondents inclusion of language that only addressed "clean" purge water, with yet no discussion of how a determination of its hazardous nature would be made, meant that EPA could not approve the document until the issue was more fully addressed.[2]

With regard to the third requirement on which Mr. Verfurth's letter focuses, EPA reiterates that these few items are not the sole basis for the imposition of stipulated penalties. EPA would likely not have imposed penalties had the lack of a groundwater sampling summary table been the only deficiency of the GWMP. Such a table is commonly included when groundwater monitoring plans are submitted to EPA for review, however, as it helps to assure compliance with the approved plan by the field crew collecting samples - something from which all parties benefit.

In conclusion, given the lack of demonstration that the facts that form the basis for the imposition of stipulated penalties are false, in accordance with Paragraph 15.6, Respondents should remit a certified or cashier's check made payable to the Treasurer of the United States of America within seven (7) days of receipt of this decision to:

U.S. Environmental Protection Agency
(Region 10 Hearing Clerk)

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[2]In addition, EPA is troubled by an implication that still pervades conversations with Respondents regarding the "contained-in" policy. That is, it appears that Respondents believe they can make the determination of whether or not concentrations of hazardous constituents from listed hazardous waste are above health-based levels. Respondents, as the generators, are responsible for determining whether the purge water is hazardous waste. Once they determine that the purge water is hazardous, however, the authority to make the determination whether or not concentrations of hazardous constituents from listed hazardous waste are above health-based levels lies solely with either the authorized state, or EPA, and is only made on a case-specific basis upon application by the generator. In this case, the State of Washington is authorized for RCRA, hence EPA's repeated provision of the name of the Department of Ecology contact so that Respondents could apply to the state to request that such a determination be made. See March 26, 1991 letter from Sylvia Lowrance, Director, Office of Solid Waste, EPA, to John E. Ely, Enforcement Director, Virginia Dept. of Waste Management, OSWER Dir. 9441.1991(04).

P.O. Box 360903
Pittsburgh, Pennsylvania 15251

Copies of the check and letter transmitting the check shall be sent simultaneously to the EPA Project coordinators at:

U.S. Environmental Protection Agency
Region 10 (WCM-121)
Office of Waste and Chemicals Management
1200 Sixth Avenue
Seattle, Washington 98101

and to the Regional Hearing Clerk at:

U.S. Environmental Protection Agency
Region 10 (ORC-158)
1200 Sixth Avenue
Seattle, Washington 98101

If you have any questions regarding this matter, as always, EPA is available to meet. With regard to this matter, however, EPA is only available for the period of time during which this dispute is ongoing in accordance with the Order.

Sincerely,

Linda M Eckman for

Michael Bussell
Director
Office of Waste and Chemicals Management

Enclosure

cc: D. Verfurth, Carney, Badley, Smith & Spellman
P. Wold, RCI Environmental
M. Smith, AGI Technologies
C. Blumenfeld, Perkins Coie
B. Maeng, Ecology, NWRO

bcc: C. Brown
K. Ogle
J. MacDonald
R. Fuentes
B. Duncan
J. Alexander
M. Bussell
M. Bailey

CONCURRENCES						
Initials:	[illegible]	RO		JES		
Name: Office:	J. MacDonald, ORC	K. Ogle WCM	C. Brown, WCM	J. Sikorski, WCM		
Date:	12/23/99	12-23-99		12-23-99		

WA 2302

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9/9/98

Rhodia

Legal Department

Paul E. Linskey
Counsel
Health, Safety and Environment

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EPA-REGION 10

Via U.S. Postal Service Express Mail

FILE COPY

September 9, 1998

U.S. Environmental Protection Agency
(Region 10 Hearing Clerk)
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251

Re: U.S. EPA Docket No. 1091-11-20-3008(h)
9229 East Marginal Way, Tukwila, WA Site
EPA Stipulated Penalty Demand, dated August 27, 1998

Dear Sir/Madam:

Enclosed please find Certified Check Number 01112 in the amount of $304,000.00, representing payment of stipulated penalties in accordance with EPA's referenced demand letter, dated August 27, 1998. This payment is also submitted in accordance with Section XV, Paragraph 15.5 of the Administrative Order on Consent for Corrective Action governing this matter. Please contact me if you have any questions.

Very truly yours,

Paul E. Linskey

Paul E. Linskey

Enclosure: Rhône-Poulenc Check Number 01112

cc: Christy Ahlstrom Brown, EPA Project Coordinator, Mail Code WCM-121
EPA Region 10 Hearing Clerk, Mail Code ORC-158

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